[illegible]

THE UNITED STATES, APPELLANT,

v.

THE PARK[illegible]-[illegible] COMPANY et al., APPELLEES.

No. 1[illegible].

BRIEF FOR THE UNITED STATES.

F. E. [illegible],
Special Assistant to the Attorney General.

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
THE PARKHURST-DAVIS MERCANTILE COMPANY, THE NATIONAL BANK OF ST. MARYS, KANS., ET AL., APPELLEES. } No. 130.

BRIEF FOR THE UNITED STATES.

This case is here by the appeal of the United States from the judgment of the circuit court for the district of Kansas in a suit brought by the United States against the respondents, appellees here. The judgment below sustained a demurrer to the amended bill of complaint for want of equity and dismissed the bill, and the United States appealed, and the case involves the question whether, upon an Indian reservation, the property of tribal Indians, residing there, can be seized and sold under State process.

STATEMENT OF CASE.

As far as it is necessary to state here, the case made by the bill is, in substance, this:

The "Prairie band" of Pottawatomie Indians owned and lived upon an Indian reservation known as the "Diminished Reserve," within the limits of Jackson County, in the State of Kansas. The bill states the usual condition of affairs existing by law and practice on Indian reservations, and the relations existing between the United States and tribal Indians on such reservations, and the exclusive control of the United States and the government of the Indians by United States laws, the appointment of licensed traders, and the prohibition of all others; that these Indians have never been naturalized, are not citizens of Kansas nor subject to its laws, and have never had any benefit of or protection from that State or its laws, and have never had or exercised any of the rights or privileges of such citizens.

The bill further shows that the firm of Eli G. Nadeau, Son & Co. were licensed traders with the Indians on this reservation by appointment of the United States. The firm was composed of Eli G. Nadeau, his son, John Nadeau, and one Eckam, a white man, while Eli G. and John Nadeau were Indians, members of said tribe and band, having always maintained their tribal relations and always lived upon this reservation.

The bill further states that, under the general allotment act of 1887, a portion of the lands of this reservation had been allotted to some of the Indians in severalty, and a portion is still held in common; that Eli G. and

John Nadeau each selected and received his allotment, and lives thereon; but each retains his share of the lands held in common, and in the moneys of the tribe held in trust by the United States, and receives his share of the annuities and other benefits provided by the United States; and, in short, notwithstanding the allotment in severalty, they sustain the same relation to the United States as before, and are under its protection and governed by its laws, as before.

While the bill states that by treaties with this tribe and by the act admitting Kansas as a State into the Union, this reservation was excluded from the State and from the jurisdiction of Kansas, yet it is believed that the court will take judicial notice that such is not the case, and that the district attorney in preparing the bill fell into error in this respect, and therefore no use will here be made of that averment.

The bill states that said Eckum, of said trading firm of Eli G. Nadeau, Son & Co., became an embezzler of most of the assets of said firm and fled the country.

The bill then states, as the gravamen of its complaint, that the defendants below, appellees here, except Haas, the sheriff, commenced several actions in the State courts of Kansas against said firm of Eli G. Nadeau, Son & Co., and caused summons therein to be served within said reservation upon Eli G. Nadeau and John Nadeau, by the defendant Haas, as sheriff of Jackson County; and some of the defendants caused orders of attachment in said actions to be issued by said courts, and under which, they caused said sheriff to go upon said reservation and seize and sell, and convert to his own use and that of the

other defendants, a large amount of the personal property of said Indian, Eli G. Nadeau, then within and upon said Indian reservation.

But it does not appear that the alleged debts, on account of which said actions were commenced and said process issued and served, were the debts of or contracted by said firm, or either of its members, as such licensed traders, nor that the two had any sort of connection, nor that the alleged debts, if ever existing, were legal, fair, or honest debts.

ARGUMENT.

The question presented involves the jurisdiction of the State of Kansas over the Indians and their property within an Indian reservation within its borders, and its right to serve the civil process of its courts upon Indians there, and to take and sell the property of such Indians within such reservation; and it also involves the jurisdiction of the United States in such Indian reservations, and its right and power to fully enforce its rules and regulations therein for the government and protection of the Indians, and to give them that protection of person and property which by treaty, by statute, and by its general policy it has so often promised them; which it owes to them by its assumed character of guardian and protector, and upon which it has both taught and compelled them to depend. For if, within their reservation, their property can be taken and sold, and without reference to whether it is for an honest debt or where the Indian has been overreached, cheated, and defrauded, just as in the case of independent persons, it is difficult to

see where, in this respect, they receive any of that protection, the need of which is the basis of that control which this Government assumes over them, or why they are not in this regard left the prey of the superior wiles of the white men, the protection from which is one of the very bases of the control which the Government assumes. For it can not be denied that protection from the superior arts and wiles of white men, as to the property of Indians, is one of the principal grounds of that control which the Government assumes and exercises over them.

That this relation of guardian and ward, of protector and dependent, exists between this Government and the Indians has been so often affirmed by this court that it has become a recognized and settled relation; and this is not a mere theoretical but a practical and legal relation, one which carries with it legal and practical duties, responsibilities, and obligations, and which must be performed by this Government just as it has assumed them. And a point which I wish to emphasize is, that the Government must *perform* and can not abdicate or surrender this trust or its duties or obligations, not even with the consent of the Indians, until at least they shall have attained a state where they stand less in need of such protection than any to which they have yet attained. That having, in various ways, acquired all their lands and all their means of subsistence and driven them into these reservations, and at all times under solemn guaranties of protection of personal and property rights, and having reduced them to a state of absolute dependency upon this nation, and in doing so

solemnly assured them the guaranty and protection of what is left, this Government can not turn them adrift in the helpless state to which it has reduced them, not even if they, in their helplessness and ignorance, consent. That having done all this, under the assurance that the Indians should be under the exclusive control of the United States and governed by its laws, this Government can not now, after receiving the full consideration for its promise, turn them over to State jurisdiction and control or make them subject to State laws. The pertinency of these considerations will appear later.

In order to a better understanding of the whole question, let us first, very briefly and generally, consider the matter without reference to the general allotment act of 1887, and consider the relation and policy of the Government with reference to the Indians generally, and without reference to treaties with particular tribes, with a view to seeing to what extent the Indians and their property, their personal and property rights, are under the exclusive control of the United States and governed by its laws, or how far under State jurisdiction and control, or governed or affected by State laws.

At first this country was found in the undisputed occupancy and unquestionable ownership of numerous powerful tribes of Indians, claiming and having the country, its soil, and jurisdiction by the best title known among nations. The crown of Great Britain, the colonies, and the United States, both under the Confederation and under the Constitution, have always recognized that title, and have generally purchased it when they obtained it.

As to all of this land which remained to the Indians, the United States, under the Confederation and since, has from time to time acquired it, and generally by treaty, ever driving the Indians farther west, before the advancing tide of civilization, superior education, art, and power; but, generally, as each treaty secured to the United States a vast territory, it contained the solemn guaranty of the United States to the Indians, of the remainder, and the next treaty which took a large portion of that, contained, also, the same guaranty of the remainder, until we have treatied the Indians out of all their lands except the reservations, which they have generally *bought*, and to which alone any guaranty remains; and one question here is, How much of that guaranty will be kept? As was said by Chief Justice Marshall in *Cherokee Nation* v. *Georgia* (5 Pet., 1, on p. 14):

> A people once numerous, powerful, and truly independent, found by our ancestors in the quiet, uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties each of which contains a solemn guaranty of the residue, until they retain no more of their formerly extensive territory than is deemed necessary for their comfortable subsistence. To preserve this remnant, the present application is made.

In this way the Indians have been deprived of all their lands. Whether they have received a tithe of an equivalent we need not inquire; and, either by treaty or by force, they have been driven to and compelled to live upon reservations by themselves. Even in case of treaties it has been with a show of force and with a full

knowledge of the inevitable. It would be idle to say that this was from the voluntary choice of the Indians, or otherwise than by the compulsion of the United States.

But all this has been with the solemn pledge, oft repeated, of this Government, and for which it received ample consideration, that upon these reservations the Indians should be under the protection of and governed—except as to some internal matters, in which they governed themselves—by the laws of the United States, and be, as to their persons and property, under the paternal care, guardianship, and protection of the United States. It can not be necessary to here point out how, in what different ways, or how often this has been promised, or where or how often this court has affirmed it.

The whole policy of the Government in this regard has been and is in accordance with, and because of, and in performance of this promise. It has assumed and exercised exclusive control and government of the Indians upon the reservations, and of the reservations themselves, so far as the Indians are concerned—compels the Indians to remain there, and limits and controls their intercourse with white people, who are not permitted to be there without permission; it holds their lands and money in trust, pays them annuities, licenses traders with them, furnishes shops, tools, and workmen, provides for their education, and generally exercises care, control, protection, and supervision over them and their property, much as is done in the case of any other guardian. Much of this, and one of its principal objects, is to protect the property of the Indians from the superior overreaching wiles and arts of the white men; and one of the princi-

pal objects in compelling them to live apart, to keep on their reservations, forbidding the intrusion of white persons, and in permitting only licensed traders to deal with them, is to protect them and their property from the sharp practices of the whites.

And all this jurisdiction, legislation, control, care, and supervision is, and ever has been, exclusive, and must necessarily be so. And without a breach of faith these Indians can not be transferred from the exclusive jurisdiction of the United States, from the government and protection of its laws, and from this promised guardianship, to State jurisdiction and State control, and be thus deprived of the most valuable and decidedly the most needed part of that which was promised them and for which they paid by the cession of their lands.

It can not be doubted that as to themselves, their persons and property, and their personal and property rights, the fair bargain was that they should all be under the exclusive jurisdiction, control, care, protection, and guardianship of the United States. In some cases this went so far as to expressly provide that their reservation should never be a part of, or under the jurisdiction of, any State. But, whether this provision was inserted or omitted in a particular treaty, it is quite safe to say it was not due to the prevision of the Indians, and equally safe to say that it would have been inserted in any treaty had the Indians known its importance.

But, whether such expression be or be not inserted, it is submitted precisely the same result follows, viz, the continuance, as before, of all the treaty and other obligations of the United States to the Indians, including this

exclusive jurisdiction, control, care, protection, and guardianship of and over them and their property. And that this Government can not, and does not, by admitting a State, within the geographical limits of which is an Indian reservation, abdicate or surrender any of this, or transfer jurisdiction to such State.

But, however this may be, as a general proposition, it is not necessary to maintain it here; for, by the act admitting Kansas as a State, the United States retained all its former jurisdiction and rights as to the Indians within its borders. The first section provides—

> That nothing contained in the said constitution respecting the boundary of the said State shall be construed so as to impair the rights of person or property now pertaining to the Indians of said Territory, so long as said rights shall remain unextinguished by treaty between the United States and such Indians * * * , or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never been passed.

And since the admission of that State the Government has always continued the same exclusive jurisdiction and control over this reservation, as to the Indians and their property, as before; nor has the State attempted any jurisdiction or control, or attempted to interfere with that of the General Government. The case made by the bill in *Cherokee Nation* v. *Georgia* (5 Pet., 1) and the case of *Woorcester* v. *Georgia* (6 Pet., 515) afford striking illus-

trations of the necessity for such exclusive national jurisdiction and control.

But because in the act admitting Kansas as a State, this Indian reservation was not expressly excluded from its limits, the process of the State may run there as to matters within State jurisdiction; but it does not follow that it may do so as against the Indians. This distinction is stated by Mr. Justice Miller in *Sangford* v. *Monteith* (102 U. S., 145, on p. 147). Speaking of a case where the Indian reservation is not expressly excluded from the limits of a Territory, he says:

> Where no such clause or language equivalent is found in a treaty with Indians within the exterior limits of Idaho, the lands held by them are a part of the Territory and subject to its jurisdiction, *so that process may run there*, however, the Indians themselves may be exempt from that jurisdiction. As there is no such treaty with the Nez Perce tribe, on whose reservation the premises in dispute are situated, and *as this is a suit between white men*, citizens of the United States, the justice of the peace had jurisdiction of the parties if the subject-matter was one of which he could take cognizance.

I take it that the expression above quoted, that the lands in the reservation are part of the Territory and subject to its jurisdiction *so that* process may run there, means no more than it says; that the lands are subject to Territorial jurisdiction *in so far* that process may run there in matters within that jurisdiction, and that it does not mean that Indian lands within a reservation, the title to which is mostly held in trust by the United States, are any less exempt from State or Territorial jurisdiction

than are the Indians themselves. It would avail little that the persons of the Indians were exempt from State process if their lands and other property could be seized and sold under such process. Besides this, all of the promises and guaranties of the United States to the Indians have been alike as to both their property and personal rights, and must be kept alike as to both.

An instructive case as to this exclusive jurisdiction of the United States is *Worcester* v. *Georgia* (6 Pet., 515). In that case it is said by Marshall, Chief Justice, page 557, that—

> The treaties and laws of the United States contemplate the Indian Territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the Government of the Union.

Speaking of this case the court said, in *United States* v. *Kagama* (118 U. S., 375, on p. 384):

> In the case of *Worcester* v. *The State of Georgia*, above cited, it has held that, though the Indians had by treaty sold their lands within that State and had agreed to remove away, which they had failed to do, the State could not, while they remained on these lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection and could not be subjected to the laws of the State and the process of its courts.

Without referring to the many cases in which this court and the circuit courts have affirmed the exclusive jurisdiction and control of the United States over the Indians and Indian reservations, it will suffice to quote

the terse summary of the whole matter by Mr. Justice Miller, in the case last cited, beginning at the bottom of page 383:

> These Indian tribes are the wards of the nation. They are communities *dependent* on the United States—dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From this very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court whenever the question has arisen.

But, what kind of protection of these "wards of the Nation" is it that is thus promised, paid for, and therefore due; due also from "their very weakness and helplessness, so largely due to the course of dealing of the Federal Government" with them? Surely it can not stop short of protection of themselves and their property against the superior arts, wiles, and trading capacity of "their deadliest enemies"—the people of the States where they are found. This is the protection most needed, and is that to which the United States has always recognized itself as bound, as is shown in various ways, and especially by its acts in keeping the Indians apart from the whites, in reserving all business intercourse with them to its own agents, in licensing certain traders to deal with

them under Government supervision, and in forbidding all others.

But this protection is a mere name, destitute of all practical benefit, and becomes a mere *vox et præterea nihil* if it permits any sharp trader to make any kind of bargain with an Indian, without reference to its honesty or fairness, and to go upon the reservation and seize and sell his property on account of it. In such case, what protection does this ward of the nation receive more than any person not under guardianship? And what kind of an execution of a guardian's trust is it that permits this? I am not now discussing what would be the rights of the parties if it affirmatively appeared that the debt for which the property of Indians had been seized was an honest debt, and as to which the Indians had not been, from want of this promised protection, overreached and defrauded, but am discussing the right of the guardian to interfere in behalf of the ward until, at least, this does appear.

TREATIES WITH THE POTTAWATOMIES.

Without going back to the earlier treaties by which the Pottawatomie tribe and the various bands of which it was composed ceded the most of their lands to the United States and placed themselves under the promised paternal care and protection of the United States, it will suffice to refer to the treaty approved July 23, 1846 (9 Stat., 853), and the later treaties.

By the treaty first referred to, the Indians ceded all of their remaining lands and, with a portion of the money received therefor, bought a reservation in Kansas of 30

miles square, of which the reservation here in question of 11 miles square is all that remains, and agreed to remove thereto, which they did. And, by Article IV, the United States agreed "to guarantee the full and complete possession of the same to the Pottawatomie Nation, parties to this treaty, as their land and home forever."

By the treaty of 1861 (12 Stat., 1191) provision was made for allotting in severalty a portion of the above reservation to such members of the tribe as had adopted the customs of the whites and severed their tribal relations, and for setting apart a portion thereof to be held in common, and for a sale of the residue for the benefit of the tribe. But the treaty in no respect modified any existing duty or obligation of the United States to the Indians, or changed its relation to them. And it provided, with reference to said several allotments, that, "Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale," and prescribed restraints upon the alienation of such general allotments, and still treating the Indians as incapable of taking care of themselves, and as under the guardianship, care, and protection of the United States, as much after such allotment in severalty as before, and, as emphasizing this, article 3 provides that—

> At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allotees under the provisions of the foregoing article, are *sufficiently intelligent and prudent to control their affairs and interests*, he may cause such allotted

> lands to be conveyed to them in fee simple, with power of alienation, and to be paid to them their proportion of the credits of the tribe, held in trust by the United States, and of other funds of the tribe. And on such patents being issued and such payments ordered to be made by the President, such *competent* persons shall cease to be members of said tribe and shall become citizens of the United States, and thereafter the lands so patented to them shall be subject to levy, taxation, and sale in like manner with the property of other citizens, upon taking the oath of allegiance, as in other cases, and upon making also proof to the satisfaction of the court that they are *sufficiently intelligent* and prudent to control their affairs and interests.

While this, upon certain conditions, may make the Indians citizens of the United States, it does not make or purport to make them citizens of any State nor subject to its jurisdiction or laws.

And that they are not such citizens nor subject to State jurisdiction, control, or legislation, is recognized by article 8 of the treaty of 1867 (15 Stat., 536), which provides that—

> Where allottees under the treaty of eighteen hundred and sixty-one shall have died, or shall hereafter decease, such allottees shall be regarded, for the purpose of a careful and just settlement of their estates, as citizens of the United States and of the State of Kansas, and it shall be competent for the proper courts to take charge of the settlement of their estates under all the forms and in accordance with the laws of the State, as in the case of other citizens deceased.

And the same jurisdiction is conferred, as to orphans.

By the treaty of 1867 (15 Stat., 531) provision was made for the removal of the most of the tribe, except this "Prairie Band," to Oklahoma, leaving the Prairie Band on this "diminished reserve" in Kansas, of 11 miles square, where they have since remained. But this treaty also still leaves in full force all of the obligations of the United States to the Indians, and, as above shown, recognizes the dependency upon the one hand and the obligation of protection upon the other.

The last two of these treaties were made after Kansas became a State. Is it conceivable, in a Government such as this, that there can be within the limits of a State, and subject, either collectively or individually, to its jurisdiction, to its laws, and to the process of its courts, either an independent, a semi-independent, or a dependent body or community of people, living apart and by themselves, with whom the United States may make treaties? It is absolutely impossible. And the fact that such treaties are made is conclusive that such people are no part of the State, nor subject to its jurisdiction or laws or to the process of its courts.

Equally conclusive of this fact is the provision, asserted by the United States and recognized and assented to by the State, that the lands of the Indians within the State are exempt "from levy, taxation, and sale," and equally conclusive is the whole of the jurisdiction and control, both in its entirety and in detail, which the United States, with the assent of the State, assumes and exercises over the Indian reservations within a State and the inhabitants thereof and over their affairs.

In am not indulging in this argument in support of the general proposition that jurisdiction over, and the government and control of the United States of, the Indians and Indian reservations, so far as relates to the Indians and their affairs, are exclusive. That has passed beyond the stage of argument and into that of judgment, but I am endeavoring to show that this is necessarily so exclusive as to exclude, as against the Indians and their property, the service of State process upon Indians within an Indian reservation. If this were not so, then while Federal laws exempted the Indians from imprisonment for debt, the State laws might subject them to it; and while Federal laws punish Indians in one way for offenses committed within a reservation, the State law might punish them in a different way, and even as an additional punishment, for the same offense. One jurisdiction or the other must be supreme and exclusive, and entirely so, and as well in the exclusion of the judicial process of the other, as in other respects.

Nor is this a matter in which a State may have or exercise a concurrent jurisdiction, to the extent, or in the particulars, that the nation has not expressly declared or exercised its intention or jurisdiction. From the very nature of the subject-matter and by the uniform practice of the Government, the whole matter of the Indians, their Government control and affairs, except to the limited extent to which these are committed to themselves, both in their entirety and in detail, are exclusively with the United States.

And it is unnecessary to more than point out that if the whites were left free to make trading contracts with

the Indians, or if, for the enforcement of contracts legally, illegally, or surreptitiously made, the original, mesne, and final process of the State courts could be served upon them within their reservation, the time would soon come when the principal duty which the United States could perform toward the Indians would be to supply them with the means of existence.

But it is by no means in treaties alone that the exclusive jurisdiction of the United States over the Indians, their right to be subject alone to Federal laws, jurisdiction, and control, and the obligation to afford them this exclusive control and the continued paternal care and protection are found. When the United States, recognizing these tribes as independent nations or communities with whom to make treaties, dwelling within the geographical limits of the United States, with no means of subsistence or existence other than that which their lands afforded them, obtained from them these lands, their only means of subsistence; forced them upon reservations which they bought and paid for; compelled them to live and to remain upon such reservations; assumed to itself and its agents their exclusive control; made its agents their only means of intercourse with the whites, forbidding all other; limiting and confining their trading intercourse with the whites—by which alone they could obtain the means of subsistence—to its licensed traders, and forbidding all other; when it took and held even these lands and the most of the money for which they had sold their vast domain, in trust for them, and forbade alienation of their reserved lands, and assumed the general guardianship over, management, and control

of themselves, their property and affairs—when, I say, the United States did all this and much more in the same direction, and all, except the acquiring their lands, upon the assumption that the Indians were not capable of taking care of themselves and especially of protecting themselves against the superior trading acts of the whites, and also for the good of its own citizens—it then and thereby—even if specific express stipulations were wanting, and they are not, assumed, and undertook to provide that exclusive jurisdiction, government by national laws, control, care and protection of person and property, the assumed need of which constituted, at least, one of the principal grounds for that control, supervision, and management which the United States has ever since assumed and exercised. These obligations and promises, express and implied, were assumed and made in a broad, liberal, and comprehensive sense and spirit, and must have a like performance, and it would seem difficult to reconcile such proper performance with a course by which such guardian should permit the property of its wards to be seized and sold under State process, upon such reservation, at least, until it affirmatively appears that such wards have not been overreached and defrauded from the want of such promised protection.

THE ACT ADMITTING KANSAS AS A STATE.

And when the act admitting Kansas as a State in the Union was passed, the duties and obligations of the United States toward the Indians within its borders were such as I have indicated above; and the act expressly reserved to the United States the right to perform all such

duties and obligations as fully as though said act had not been passed. It provides that—

> Nothing contained in the said Constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, * * * or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed.

Among the rights of these Indians which were not impaired by the creation of Kansas as a State was the right to be under the exclusive jurisdiction and control of the United States, and to be governed by its laws alone, and to be subject to the jurisdiction, legislation, or process of no other power, and to have the care and protection of the United States against the arts, greed, or rapacity of the whites; and the right which the United States reserved was the right to furnish and give all this. So there can be no question of want of power or of conflict of jurisdiction.

And as in all this, in providing for its own control of the trading intercourse of the Indians with the whites, in forbidding all other, and in other ways, the United States has proceeded upon the ground that the Indians were incapable of protecting themselves in such trading intercourse, it would follow that the guardianship, care, and protection assumed and promised did not stop with the mere exemption of their lands "from levy, taxation, and sale." As these lands are no longer hunting grounds,

but useful only for agriculture, it is of little avail to the Indians that they are exempt from levy or sale if, as soon as they raise anything, it can be seized and sold upon some trading contract which is itself forbidden by law.

And here I desire to submit a point for the consideration of the court, premising that as to these particular Indians, in their capacity of licensed traders, I shall speak later. Inasmuch as trade by whites with the Indians is generally prohibited, before their property is liable to attachment and sale for an alleged debt, it must affirmatively appear that the transaction out of which it grew and the debt itself were legal, and the debt an honest one—or at least the former must appear—and neither appears in this record.

Again, conceding *arguendo* what I do not concede otherwise, that if the property of an Indian were found outside of the reservation it might be seized and sold under State process, still it does not follow that this may be done on such reservation.

Conceding that the jurisdiction of the United States over this reservation is not exclusive, but that, being within the limits of the State, its jurisdiction extends and its process may run there *in all matters within State jurisdiction*, still, it is submitted that as to the Indians on such reservation, their government, their property and affairs, these are not matters within State jurisdiction, but are within the exclusive jurisdiction of the United States, and just as much so as if the reservation were not within the limits of the State.

To illustrate, let us suppose again that the laws of Kansas permitted imprisonment for debt, and that the Federal

law did not. The same considerations which would permit the seizure upon the reservation of the property of an Indian under State process would authorize a creditor to seize the Indian himself on the reservation and hale him off to the nearest State jail, there to remain until he paid the uttermost farthing, and would forbid the United States to afford him the protection of its more benign laws, even though solemnly pledged and paid for.

Federal laws, courts, and Federal practice treat these Indians, as to their trading intercourse with the whites, as not *sui juris*, and those courts, in the case of a contract between a white man and an Indian—not absolutely void from being prohibited—would not hesitate to inquire into the fairness of the contract, or in the exercise of that guardianship which the United States has assumed and promised. State courts might treat them very differently, and probably would, and inquire, in an action at law, only as to the legality of the contract, just as it would in a suit between two of its own citizens. But, be this as it may, we have promised the Indians the protection of our own laws and our own Government, and this must be exclusive of all others.

It is therefore submitted that, independently of the general allotment act of 1887, the Indians and their property within their reservations are not subject to State jurisdiction, State laws, or the process of State courts.

THESE INDIANS AS LICENSED TRADERS.

If it be again urged that these particular Indians whose property was thus seized were licensed traders, and that it could not have been intended that such traders

should be exempt from the ordinary process for the collection of debts which, as such, they might contract, there are several answers to such claim. The first, and which is quite conclusive, is that it does not appear from the record that the alleged debt for which their property was taken was contracted by them as such traders, or that the two had any sort of connection. On the contrary, for aught that appears, the debt, if it ever existed, was merely the individual debt of these Indians, and also contracted in violation of the law forbidding trading intercourse between whites and Indians. In any event it is quite sufficient that it does not appear that the debt was contracted in their capacity of licensed traders. If it were at all necessary it might be further answered that the law and the general policy of the Government forbidding trading between whites and Indians makes no exception in case the Indian is a licensed trader; and further, that whether the trader be an Indian or not the law does not contemplate a purchase of supplies on credit, nor make provision therefor, nor for the enforcement of any obligation. And still further, when such trader is such Indian every one deals with him with his eyes open and with a full knowledge that he may not have the ordinary facilities for collecting his debt, and the maxim "*caveat emptor*" may in such case be read "caveat seller" or "caveat lender." But the first answer is quite sufficient.

GOVERNMENT OF INDIANS BY STATUTE.

In later years Congress has found it more convenient to govern the Indians by statute than by treaties; and

one of the means for this is the general allotment act of 1887. But Congress can not, by enactment, absolve the nation from its treaty or other obligations or promises, express or implied, to the Indians, nor refuse their performance while retaining the price paid for such performance. While our course of dealing with them has reduced a once numerous and powerful nation to a mere beggarly remnant, and thus rendered the performance of our obligations less onerous and less expensive, this by no means lessens our obligation to the few who are left, nor justifies our nonperformance.

THE GENERAL ALLOTMENT ACT OF 1887.

This brings us to the only really difficult branch of the case, the effect of the general allotment act of February 8, 1887.

The bill shows that the two Indians, Eli G. Nadeau and his son John Nadeau, whose property was seized, while still, as ever, retaining their tribal relations and living with their tribe on the reservations, have had allotted to each of them, under said act, a portion of the land of said reservation, which they selected and occupy; but that they still retain their shares of the land held in common and of the funds of the tribe in the hands of the Government and receive the annuities and other benefits furnished by the Government, as do the other Indians, and that, in short, except as to said allotments in severalty, they continue the same relations to the United States as before and as do the other Indians; that they have never been naturalized nor exercised or had any of the benefits or rights of citizens of the United States or of the

State of Kansas, nor any protection from its laws. And one principal question is, What effect has this statute, under these facts, in releasing the United States, as to those Indians, from its obligations, dispensing with their performance, depriving these Indians of guardianship and protection as to person and property, in depriving them of the right to be governed exclusively by the laws of the United States, and to have the benefits and protection of those laws, and in making them citizens of the State of Kansas or governed by its laws and subject to the process of its courts?

The first section of this act provides for the allotment, by order of the President, of lands in Indian reservations, with some exceptions provided in the act, to the Indians in severalty, and authorizes the President, "whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation or any part thereof to be surveyed or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon, in quantities as follows." By section 2 such allotments are to be selected by the Indians, but the same section also provides that if the Indians do not select within four years the Indian agents shall select for them.

It will be noticed that, while theretofore, allotments had been made when the Indians desired it and to the extent desired, leaving those who so chose to hold their lands in common, a new departure is here inaugurated, and the allotment here provided is, as to the Indians, compulsory and without regard for their wishes. It will be further noticed that the selection is also compulsory.

The Indian must either select, himself, with a chance of thus getting what he prefers, or let the agent select for him and take the chances of what he will get. Because of this, because he is compelled to select, nothing in the way of assent on his part to either the allotment or to the statute, or to the provisions of section 6 thereof, whereby he is in terms deprived of the most valuable and decidedly the most needed part of that for which he had bargained with and paid the United States, can be in any wise implied; but the whole, as to him, is arbitrary and compulsory.

The act provides that after such allotments patents shall issue to the respective allottees, stating that the United States will hold the land for twenty-five years in trust for such allottees, and contains stringent provisions against alienation by the Indians; and provides that after the period fixed, patents will issue for such lands in fee simple and discharged from any trust. In this way the United States, without the consent of the Indians, will have discharged itself from all of its obligations to the Indians so far as concerns their government, their care and protection, and the little which is left to them of their lands.

But decidedly the worst features of the act, and those the most unjust and most injurious to the Indians, are found in section 6, which provides that—

> Each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the State or Territory in which they may reside; and no *Territory*

shall pass or enforce any law depriving any such Indian within its jurisdiction of the equal protection of the law.

But as the Indians are turned over to the tender mercies of the State, such State may pass any such law, because Congress is powerless to prevent it.

Now, at the time of the enactment of this law, and ever since, and now, the treaty and other obligations, promises, and duty of the United States to these Indians were, ever have been, and now are those which I have indicated above, and these included as to these Indians, their personal and property rights, the exclusive guardianship, paternal care, and control of the United States, and especially—because the most needed—their government and control by the laws of the United States alone; and it is submitted that Congress is without power, by legislative enactment, to absolve the nation from these obligations, or release it from their performance, or to deprive the Indians of this government by Federal laws, and turn them over in the helpless condition to which the United States has reduced them, to those so properly called "their deadliest enemies."

And what power has Congress to subject the Indians or any other people, collectively or individually, to the civil or criminal laws of a State? Or to give to or confer upon them, as this act purports to do, the benefit of such laws? The State itself has something to say about that. All that Congress can do, if it has any such power, in a case like this, is to surrender its own jurisdiction, but it can confer none upon a State. And unless the State accept such a gift, with all its burdens of gov-

ernment, degeneracy, and pauperism, the only effect of the statute is to make these "wards of the nation" outcasts and vagabonds upon the face of the earth, with no country and no laws for their protection! Doubtless the States will take them in, so long as they have anything which can be also taken; but history and ordinary judgment tell us what treatment they will receive and what will be their fate.

This surrender of Federal jurisdiction and subjection to the civil and criminal laws of the State makes the Indians completely and exclusively under State control, their property subject to levy, taxation, and sale; in effect, abolishes the reservations, which were promised as their exclusive homes forever, and opens wide the door for the hitherto forbidden intercourse of the whites, and, in short, withdraws from and refuses to the Indians the most valuable, because the most needed, of all that was promised to them, while we at the same time retain the more than full price paid us for the performance of such promises.

If Congress is to turn the Indians over to the criminal laws of the State, it would have been gracious, at least, to first repeal its own laws for their punishment for offenses committed by them. Are they to be subject, for the same offense, to punishment in both jurisdictions?

Without pursuing this subject further, if the sixth section of this act is not upon its face a palpable violation of the most sacred treaty and other obligations of the United States, while retaining the full price paid for their performance, no argument can make it so.

But even if section 6 of this act is in violation of our treaty and other obligations to the Indians, what then? It is to be borne in mind that the most important and valuable of our obligations to the Indians are not those of express treaties, but arise from facts and circumstances which give them even a higher obligation. Such obligations of such a Government as this must be of some binding force; and if they are, it would seem that they could be enforced in this court, at least when it is the United States which seeks their enforcement.

I am aware that this court has held that generally a treaty is subject to subsequent repeal or annulment by Congress; but so far as I have examined these were cases where private individuals set up the treaty as a ground for the alleged invalidity of the later statute. Here the case is different. Here it is the United States which protests that Congress is not the nation, and that it has no power by legislative enactment to violate, repudiate, or annul the sacred pledges of the nation. It is the United States which appeals to a coordinate branch of the Government—the only tribunal competent to sit in judgment of the matter—to enforce its obligations, which it is ready and willing to perform. And it would seem an anomaly that a Government like this was without power to enforce its own obligations and to perform its own covenants, and lacked a tribunal by which at its own request its obligations might be enforced, and one competent to decide whether one coordinate branch of the Government could repudiate and annul national obligations, and whether in a given case its action would do so.

But the great and controlling difference between the cases referred to and this case, and the reason why they are not applicable here, is that those were cases of treaties with *foreign nations*, compacts between sovereign and independent States, which depended for their performance or their repudiation upon the political branch of the governments which made them, and with which, or their enforcement, the judiciary had little or no concern. Here the case is different. *These Indians were not foreign nations.* (*Cherokee Nation* v. *Georgia*, 5 Pet., 11.) They were people resident and dwelling in our midst, but apart from our people, and at the time when the most of the treaty and other obligations of the United States to them were assumed and promised, under the jurisdiction and protection of the United States, and as expressed in the treaty of 1846, "the United States giving, at the same time, promise of all proper care and paternal protection." Our compacts with, and promises and obligations, express or implied, to the Indians, were far from being treaties with foreign nations, or governed by the laws applicable to such treaties. They resemble more agreements with, and promises and obligations to, our own people, both as collective bodies and individually, and in the enforcement of which the Federal courts have the same jurisdiction as in respect of other obligations of the United States. And in this respect, barring the exemption of the United States from suit in its own courts or elsewhere, the courts have ample jurisdiction to enforce the contracts and other obligations of the United States. This is shown, also, by the fact that, when it consents

to be sued, or waives this objection, the courts, without any conferring of jurisdiction, have power to hear and and determine the matter. And when the United States brings the action, no such question of exemption from suit can arise.

And it is to be borne in mind that all of these rights of the Indians which I have indicated, and especially to be under the exclusive control and protection of the United States and to be governed exclusively by its laws, were rights paid for and vested in these Indians long before the allotment act of 1887 was passed. And it is submitted that they continue so vested, and that this court, upon the application of the United States, has the power to protect and enforce them.

There are many things pertaining to things governmental which are not legislative, and are therefore not within the competency of Congress. Congress can not, by enactment, declare one person indebted to another, and thus create a conclusive obligation. Congress cannot, by enactment, take from one person his property and bestow it upon another. It can not, by enactment, divest vested rights in property. It may repeal a statute, but it can not divest rights already vested under it.

And although the Constitution does not expressly forbid Congress, as it does the States, to pass any law impairing the obligations of contracts, yet it is submitted that such legislation is as much forbidden by that instrument as if expressly prohibited.

In *Fletcher* v. *Peck* (6 Cranch, 87) Chief Justice Marshall, speaking of an act of the legislature of Georgia

If, when the United States purchased their lands from these Indians, and procured their agreement to go upon reservations and remain there, it promised them anything as the executory part of the price to be paid therefor, it thereby contracted and assumed a binding obligation which it can not repudiate, from which Congress can not absolve it, and which, having its exemption from suit, this court has ample power to enforce.

declaring invalid a previous conveyance made by the State, says, page 132:

> The legislature of Georgia was a party to this transaction, and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be conceded as a mere act of power, which must find its vindication in a train of reasoning not often heard in courts of justice.

And on page 133:

> The legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts. its act is to be supported by its power alone, and the same power may divest any other individual of his lands if it shall be the will of the legislature so to exert it.

And on page 135:

> It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection.

It is true this was said in a case where a State undertook to impair the obligation of a contract, but it was said generally of every legislative power, and whether hampered by constitutional inhibitions or not, and in relation to the legislative power to impair or annul con-

tracts, and was so quoted by Chief Justice Chase in his dissenting opinion in the *Legal Tender Cases* (12 Wall., 457, p. 581). And in *Hepburn* v. *Griswold* (8 Wall., 603) it is said, page 623, by Chief Justice Chase:

> We think it clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we can not doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

While this case, as to its main point—the unconstitutionality of the legal-tender clause of the act of 1862—was overruled in the legal-tender cases, *supra*, and while the court there held that Congress might well exercise the powers expressly granted, even though incidentally impairing the obligations of contracts, it is believed that this court has never held that Congress could enact any law "which necessarily, and in its direct operation, impairs the obligation of contracts." It is not alone that such action is not legislative in its character, but also because it is violative of those principles of justice which the Constitution was expressly ordained to establish.

The lack of such power is shown also by another consideration. Congress has such power only as is conferred either expressly or by fair implication by the Constitution. Such power is not expressly conferred, and

certainly the power to annul contracts is not necessary to the exercise of any power expressly conferred, and therefore does not exist.

And the fifth amendment to the Constitution forbids that any person shall be deprived of property without due process of law, and a mere legislative enactment is not such due process. But perhaps constitutional provisions do not extend in favor of Indians. Still, there ought to be some way for enforcing the obligations of a great nation, even with Indians. It was once thought that there was no obligation to keep faith with heretics or unbelievers, but I believe this has never been the doctrine of this Government. And these rights of the Indians, paid for and vested as they are, are property in every legal sense, and just as much so as are their lands or their money held in trust by the United States.

And, to illustrate, suppose Congress should undertake, by enactment, to confiscate these lands for the benefit of the United States, or to cover into the Treasury for its use the moneys held in trust for the Indians. In an action by the United States to protect this property for the Indians, is this court without power to protect and enforce such property rights, to enforce the obligations of the nation, and to declare invalid such legislation? *And yet the rights here asserted are held by precisely the same tenure; arise from precisely the same facts and circumstances and in the same manner; have the same origin, and are just as sacred as in the case of their land and money.* And if the Indians can not be deprived of the

latter by legislative enactment, no more can they be of the former.

These Indians are themselves without power to sue in the Federal courts to protect their rights, and unless the United States can do so, these wards of the nation are absolutely without legal rights or the means for their enforcement, and are outcasts, with no protection from that rapacity, the need of protection from which was one of the chief grounds for that guardianship and control which the nation assumed and promised. This is not a spectacle for national pride or self-laudation, nor one upon which the partial historian would dwell with pleasure. A people reduced, by the policy and dealings of the United States, to a mere beggarly remnant, forced into a state of absolute dependency upon the nation, and then turned adrift without protection, and with no rights save such as are common to the weak, the defenseless, and the uncared for, to

> Kneel upon the sod
> And sue, in forma pauperis, to God.

Their very weakness, helplessness, and forced dependence make a pathetic and forcible appeal to a great nation to try if it has not both the power, and the ingenuity to find some legitimate means, by which its promises and obligations my be enforced. It is not a question of good faith, right, or justice. These stand admitted. But it is a question whether, in a nation like this, there are any legitimate means by which the national faith may be kept, right done, and justice administered.

THE BILL NOT OBJECTIONABLE AS BEING MULTIFARIOUS.

While the judgment of the court below sustaining the demurrer is based entirely upon the want of equity in the case stated (Rec., p. 41), the demurrer makes the further point that the bill is multifarious (Rec., p. 40).

The gravamen of the complaint is the seizure, sale, and conversion by State process of the property of Indians upon an Indian reservation. While the bill states that each of the defendants below, except Haas, the sheriff, caused orders of attachment to be issued in their several actions and placed in the hands of the sheriff, yet, so far as the bill shows, but one, that in favor of The National Bank of St. Marys, was served by levy. Yet the bill avers that the conversion effected by the levy and sale was to the use also of all the other defendants, and that the defendants are about to convert the proceeds of such sale to their own use and benefit, and to distribute said proceeds among themselves. All this might well be and the defendants be jointly interested in such levy and sale and in the proceeds, under an arrangement between them, by which a test case was made by one levy for the benefit of all, if it held, the sheriff having the other orders in his hands. In any event it would seem that the bill, on its face, makes a case good as against a demurrer of a joint interest. And, as the cases are precisely alike and depend upon the same facts and the same evidence, so far as is material here, it would seem that to avoid a multiplicity of suits a joint action may be sustained against all.

If, however, there is an improper joinder of parties, it is suggested that the defect may be cured by the complainant's dismissing the bill as to any one or more of the defendants found to be not proper parties. And this the complainant here offers to do.

Respectfully submitted.

F. E. HUTCHINS,
Special Assistant to the Attorney-General.

JOHN K. RICHARDS,
Solicitor-General.